



**REPORT**  
**on**  
**OCCUPIERS' LIABILITY**

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**ONTARIO LAW REFORM COMMISSION**





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ONTARIO LAW REFORM COMMISSION  
1972

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DEPARTMENT OF JUSTICE

The Ontario Law Reform Commission was established by section 1 of *The Ontario Law Reform Commission Act, 1964*, for the purpose of promoting the reform of the law and legal institutions. The Commissioners are:

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## ONTARIO LAW REFORM COMMISSION

TO THE HONOURABLE ALLAN F. LAWRENCE, Q.C.,

*Minister of Justice and  
Attorney General for Ontario.*

Dear Mr. Attorney:

Pursuant to the provisions of section 2 (1) (a) of *The Ontario Law Reform Commission Act*, the Commission initiated a study concerning the law governing the liability in tort of occupiers of premises for injuries suffered by persons coming on the premises.

This particular area of the law has been reviewed recently in a number of jurisdictions where such liability is based on common law principles. Remedial legislation has been enacted in some of these jurisdictions. The Conference of Commissioners on Uniformity of Legislation in Canada has formulated a model act. The volume of material in this area is substantial and helpful.

The Commission has completed its study and now submits its report.



## INTRODUCTION

The law concerning the liability of occupiers of premises exhibits the faults of the common law when it becomes overly concerned with the preservation of form while still seeking to do justice in individual cases.

In this field, perhaps more than in any other, legal fictions have developed to the extent that the outcome of any particular case now seems almost fortuitous.

In Ontario, the general law of negligence has developed so that instead of announcing fixed categories of situations in which a duty of care exists, the courts have indicated that one must take reasonable care to avoid acts or omissions which one can reasonably foresee would be likely to injure one's neighbour. This has been especially so since *Donoghue v. Stevenson*.<sup>1</sup> A "neighbour" was defined as a person so closely and directly affected by one's acts that one might reasonably be expected to have him in contemplation.

Unfortunately, the law governing the liability of an occupier of lands and premises, has remained largely unaffected by the broad principles of *Donoghue v. Stevenson*.<sup>2</sup> This situation has come about largely as a result of concepts which were developed by the English courts in the nineteenth century and which pre-dated the first judicial attempts to generalize the duty issue in negligence. As such they have remained virtually unimpaired by the modifications which might be expected with the passage of years. The original principles of occupiers' liability were conceived by reason of an over-zealous preoccupation with the sanctity of real property rights, even over that of human life. To ensure that these rights would be fully protected, the English courts developed a rigid series of categories of entrants to whom differing duties were owed by occupiers.

The categories and duties which developed were as follows:

1. Invitee—the occupier was liable for unusual dangers on the premises of which he should have known.
2. Licensee—the occupier was liable for traps on the premises of which he knew.
3. Trespasser—the occupier was liable only for harm done by the occupier's intentional or reckless conduct.

Unfortunately, those three categories were found by members of the judiciary not to be exhaustive. There developed in English jurisprudence extensions of these categories and duties, particularly where persons entering the premises were persons under contract, or persons entering as

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<sup>1</sup>[1932] A.C. 562.

<sup>2</sup>*Ibid.*



of right. Because of judicial confusion or otherwise, some judges spoke in terms of “licensees with an interest”, “bare licensees”, and “permittees”. To enlarge the right of recovery, particularly for youthful plaintiffs, the courts developed the “allurement” approach, which served to elevate children from the trespasser category to the licensee category, usually by the creation of fictional licences.

The need for legislative reform became apparent in the late 1940’s in England, at a time when social and economic developments were leading to a reassessment of the rights and obligations that should follow from the ownership of land. As a result, the English Law Reform Committee undertook a study of the field, and their report in 1954 formed the basis for the enactment in England, in 1957, of the *Occupiers’ Liability Act* (see Appendix A). That Act did away with the categories of licensees and invitees, and created one common category of lawful entrant—the “visitor”. Unfortunately, the English Act did nothing to affect the law which had developed with respect to the rights of, and duties owing to, the persons entering premises who had come within the “trespasser” category.

In 1960, Scotland passed its own *Occupiers’ Liability Act* (see Appendix B), broader in scope than the English Act by reason of its wide application to all persons entering premises, regardless of their former category.

New Zealand passed an Act in 1962 (see Appendix C) which was substantially modelled on the English Act passed five years before.

In the course of its deliberations, this Commission concluded that there was a major shortcoming in the English Act, in that it is not applicable to trespassers. The Commission considered carefully the Report of the New Zealand Torts and General Law Reform Committee, prepared in 1970. That Report canvassed in detail the law of the liability of an occupier to trespassers, and recommended certain amendments to the 1962 New Zealand Act in order to apply it to trespassers as well as lawful visitors.

This Commission was unable to agree with part of those recommendations, in view of the fact that the minimum age of a person who might be considered a trespasser was arbitrarily set at sixteen. It was felt that such an approach might in some cases give rise to anomalous results.

In the course of its deliberations, the attention of the Commission was drawn to the English Court of Appeal decision of *Herrington v. British Railways Board*.<sup>3</sup> The Commission was impressed with the logic of the judgments contained therein, and the decided preference of the three members of the English Court of Appeal for the approach taken in the Scottish Act, as opposed to that contained in the English Act.

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<sup>3</sup>[1971] 1 All E.R. 897.

The Commission finally decided to recommend the enactment of legislation which would encompass all types of persons entering lands and premises, regardless of their former categories.

This Report contains the Commission's recommendations, and a proposed draft Act embodying those recommendations. In formulating the Act, the Commission has received considerable assistance from the Acts above referred to, as well as the *Uniform Occupiers' Liability Act* (hereinafter described as the Uniform Act) (see Appendix D) as drafted by the Conference of Commissioners on Uniformity of Legislation in Canada. In addition, the Commission found most helpful the Report on Occupiers' Liability of The Institute of Law Research and Reform of Alberta, which was published in December, 1969.

It is the hope of the Commission that the enactment of the proposed draft Act will: (a) serve to restore some order to the confusion which has developed in Ontario in the field of occupiers' liability; (b) provide greater certainty in determining the rights and liabilities of persons involved; (c) restore the field of occupiers' liability to the area of the general law of negligence; and (d) widen the areas of recovery, based on the "neighbour" concept of negligence, and not by the creation of legal fictions.

The form of this Report is a section by section commentary on the proposed draft Act. References have been made to other examples of occupiers' liability legislation, either proposed or in force. Where the Commission has recommended the utilization of different wording or concepts, the reasons for such changes are stated in the commentary.

## THE COMMISSION'S DRAFT ACT: COMMENTARY BY SECTIONS

### DEFINITION SECTION

*Section 1—In this Act,*

*(1) “occupier” means*

*(a) a person who is in physical possession of premises, or*

*(b) a person who has responsibility for, and control over the condition of premises, the activities there carried on, and persons allowed to enter premises*

*notwithstanding that one or more other persons are also occupiers.*

### COMMENT

In no other existing or proposed Act affecting occupiers' liability is “occupier” defined.

The Scottish Act, the English Act and the New Zealand Act (see Appendices) allow the rules of common law to determine on whom the duty of care is imposed, in cases where persons entering premises, or their property, sustain damage.

The Commission was concerned that in the process of assessing liability there has developed a certain degree of confusion as to who is an occupier. The Commission concluded that it is desirable to define the term for greater certainty.

Clearly an owner of land in possession, or a lessee in possession, is an occupier. In going beyond those areas, the tendency of the courts has been to emphasize the element of “control”. In Ontario, the recent direction has been that complete or exclusive control is not necessary in order for a person to be regarded as an occupier. Moreover, it has become apparent that in many circumstances, there may be more than one occupier of premises.<sup>4</sup>

The judgment of Lord Denning in the decision of the House of Lords in *Wheat v. Lacon*<sup>5</sup> provides an interesting extension to the meaning of “occupier”. In the course of his judgment, Lord Denning said:

In order to be an occupier, it is not necessary for a person to have entire control over the premises. He need not have exclusive

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<sup>4</sup>*E.g., Boryszko v. Board of Education* (1962), 35 D.L.R. (2d) 529.

<sup>5</sup>[1966] A.C. 552.



occupation. Suffice it that he has some degree of control. He may share the control with others. Two or more may be occupiers. And whenever this happens, each is under a duty to use care towards persons coming lawfully onto the premises, dependent on his degree of control. If each fails in his duty, each is liable to a visitor who is injured in consequence of his failure, but each may have a claim of contribution from the other.

Later in his judgment, Lord Denning stated: "If a person has any degree of control over the state of the premises, it is enough." At another point, he said: "I ask myself whether the respondents had a sufficient degree of control over the premises to put them under a duty to a visitor."

Clause (a) of subsection (1) covers situations where defendants are in actual possession at the time of potential liability.

Clause (b) of subsection (1) covers situations where defendants, although absent from the premises, still have some measure of control and ability to admit and exclude proposed entrants.

The last part of the definition attempts to cover the common circumstance in which the area where the damage is caused is controlled by more than one person. Such areas would be apartment buildings, shopping plazas,<sup>6</sup> school premises where contractors are performing work for school Board,<sup>7</sup> and any area where a contractor is performing work for the occupier.<sup>8</sup>

#### *Section 1—In this Act . . .*

(2) "*premises*" means lands and structures or either of them.

#### COMMENT

The Scottish Act, the English Act, and the Draft Uniform Act (see Appendices) do not define "premises". The New Zealand Act defines "premises" as including "land unless the context otherwise requires".

The Commission's proposed draft Act speaks in terms of "persons entering on the premises". It is desirable, for greater certainty, to define what is meant by "premises". The Commission's intent is to make it clear that premises include both land and structures, and that the Act would apply in either instance.

Precisely why "structures" should be covered in the proposed legislation is more fully discussed under section 2 of the draft Act.

<sup>6</sup>*Diamond v. Hazlett*, [1969] 1 O.R. 641.

<sup>7</sup>*Boryszko v. Board of Education* (1962), 35 D.L.R. (2d) 529.

<sup>8</sup>*Kearny v. Waller*, [1965] 3 All E.R. 352; *Fisher v. C.H.T.*, [1966] 1 All E.R. 88.

## LIABILITY IN TORT SECTIONS

*Section 2 (1)*

*The provisions of this Act apply, in place of the rules of the common law for the purpose of determining the care that an occupier is required to show towards persons entering on the premises in respect of dangers to them or to their property, and to the property of persons who have not themselves entered on the premises, that are due to the state of the premises, or to anything done or omitted to be done thereon, and for which he is in law responsible.*

## COMMENT

Comparable provisions are to be found in subsection (1) of section 1 of both the Uniform Act and the Scottish Act. The wording used in the Scottish Act has been slightly altered so that it is made abundantly clear that the proposed Act will cover not only claims for personal injury but property damage as well. The Scottish Act does cover claims arising out of damage to property, but this provision is found in a subsequent subsection of that Act.

The proposed Act is designed to replace the rules of the common law with respect to occupiers' liability. The main effect of the substitution of the new rule is the abolition of the distinction between the duty owed to invitees, the duty owed to licensees, and the duty owed to trespassers. A common duty of care is imposed as provided in clause (a) of subsection (1) of section 3 of the proposed Act.

Subsection (2) of section 1 of the English Act and subsection (2) of section 1 of the Scottish Act both provide that the rules of the common law remain unchanged as to the person on whom a duty of care is imposed. The proposed Act provides for a definition of "occupier", which may or may not change the common law. As indicated previously, the Commission felt it preferable to define "occupier" for greater certainty.

Subsection (2) of section 1 of the English Act also provides that the common law regarding the persons to whom the duty is owed remains unchanged. As noted before, the English Act applies only to "visitors", visitors being only those persons entering the premises who would be within the former categories of "invitees" and "licensees".

Prior to the passing of the English Act the ordinary rules of negligence applied against an occupier of premises if an entrant were injured as a result of operations or activities carried out on the premises. The purpose for which entry was made was irrelevant.<sup>9</sup> It is not yet

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<sup>9</sup> *Dunster v. Abbott*, [1953] 2 All E.R. 1572; *Slade v. Battersea*, [1955] 1 All E.R. 429; *Slater v. Clay Cross Co. Ltd.*, [1956] 2 All E.R. 625. See also the Commission's comment under section 3 (1) (b) of the proposed Act.

clear whether this doctrine still exists in England, although the *Herrington* decision seems to indicate that it does not.

The Commission sought to clarify the matter by making the proposed Act cover both situations—that is, the Act will apply whether the cause of action arises as a result of a static condition or an activity being carried on. This has been specifically covered by clause (b) of subsection (1) of section 3 of the proposed Act.

#### *Section 2 (2)*

*The provisions of this Act apply in like manner and to the same extent as in subsection (1) to persons entering on:*

- (a) ships and vessels;*
- (b) trailers and portable structures designed or used for a residence, business or shelter; and*
- (c) trains, railway cars, vehicles and aircraft, except while in operation,*

*and to their property thereon, and to the property of persons who have not themselves entered thereon.*

#### COMMENT

Comparable provisions are to be found in subsection (3) of section 2 of the English Act, subsection (3) of section 1 of the Scottish Act, subsection (3) of section 3 of the New Zealand Act, and subsection (3) of section 1 of the Uniform Act.

The Commission felt that the wording of the first three Acts was too wide, in that those Acts would apply to regulate “the obligations of a person occupying or having control over any fixed or moveable structure, including any vessel, vehicle or aircraft”. The proposed section is therefore similar in wording to the Uniform Act, although not an exact duplication.

The proposed Act will apply not only to fixed areas of land and fixed structures on land, but also to temporary structures such as staging and scaffolding, poles, wires, trailers, etc., and to vehicles capable of being moved on land or water or through the air. The concept of common duty of care will apply to all such objects.

The proposed Act should not apply to those things referred to in clause (c) of subsection (2) of section 2, while they are in operation. In this circumstance many other Acts and rules of common law apply and the proposed Act should not impair or affect the application of those laws.



Reference should also be made at this point to section 9 of the proposed Act, which clearly excludes the application of the Act to situations “under or by virtue of any contract for the hire of, or for the carriage for reward of persons or goods in any vehicle, vessel, aircraft or other means of transport, or under or by virtue of any contract of bailment”. In such situations, which obviously might involve some of the objects referred to in this subsection, the Act does not operate.

Courts in England and Canada have held in the past that the law of occupiers’ liability applies to factual situations involving ladders,<sup>10</sup> elevators,<sup>11</sup> barges,<sup>12</sup> boats and ships,<sup>13</sup> trains,<sup>14</sup> portable derricks,<sup>15</sup> and streetcars.<sup>16</sup>

The Commission felt that it would be desirable to make it clear that the general scope of subsection (1) of section 2 extended to the objects set out in subsection (2).

Courts in Canada and in England have in the past freely applied the law of occupiers’ liability to damaged property.<sup>17</sup> The Commission proposes that this liability should continue. Subsection (1) of section 2 makes the proposed Act applicable to property as well as to persons entering on premises, and to property that has been damaged on such premises even though the owner has never entered thereon.<sup>18</sup> The concluding part of subsection (2) of section 2 makes the property provisions of the proposed Act similarly applicable where property has been damaged on any of the objects enumerated in the subsection.

### *Section 3 (1) (a)*

*An occupier of premises owes a common duty of care to all persons entering on the premises, except in so far as he is free to and does extend, restrict, modify, or exclude his duty by express agreement or otherwise, which duty is to take such care as in all the circumstances of the case is reasonable, to see that the person and his property will be reasonably safe in using the premises for the purposes contemplated by the occupier.*

<sup>10</sup> *Woodman v. Richardson*, [1937] 3 All E.R. 866.

<sup>11</sup> *Haseldine v. Daw*, [1941] 2 K.B. 343.

<sup>12</sup> *Tolfree v. Russell*, [1943] 2 D.L.R. 234.

<sup>13</sup> *King v. Northern Navigation* (1913), 27 O.L.R. 79; *Webber v. Toronto*, [1955] O.W.N. 181.

<sup>14</sup> *Grand Trunk Railway v. Barnett*, [1911] A.C. 361; *C.N.R. v. Diplock* (1916), 53 S.C.R. 376; *Nightingale v. Union Colliery* (1905), 35 S.C.R. 65.

<sup>15</sup> *Redwell Servicing Co. v. Lane Wells* (1955), 16 W.W.R. 615.

<sup>16</sup> *Gebbie v. Saskatoon*, [1930] 4 D.L.R. 543.

<sup>17</sup> *Redwell Servicing Co. v. Lane Wells* (1955), 16 W.W.R. 615; *Grossman v. The King*, [1952] 1 S.C.R. 571; *Janes v. Triton Centres Ltd.* (1969), 4 D.L.R. (3d) 327; *The Cawood III*, [1951] P. 270.

<sup>18</sup> *Drive Yourself Ltd. v. Burnside* (1959), 59 S.R. (N.S.W.) 390.



## COMMENT

Comparable provisions relating to the "common duty of care" are contained in subsection (1) of section 2 of the Uniform Act, subsection (2) of section 2 of the Scottish Act, section 2 of the English Act and section 4 of the New Zealand Act. None of these Acts, however, has precisely the same terminology as this proposed subsection.

To persons formerly coming within the definition of invitees, licensees, and trespassers, the duty is to take "such care as in all the circumstances of the case is reasonable, to see that the person and his property will be reasonably safe . . .".

What is "reasonable care" is a matter for determination by a court and this results, unfortunately, in a loss of predictability in so far as that determination is concerned. However, the need to resort to those fictions employed by the courts in determining the category in which the plaintiff should be placed, will be removed. In addition, the proposed Act will make it unnecessary for the courts to continue to involve themselves with such concepts as "traps" and "unusual dangers", which for a long time have served only to obscure the issues for practitioners, litigants and the judiciary alike. The need for the courts to make a number of value judgments will be replaced by the need to make only one, and this, moreover, is one with which the judiciary has been acquainted for years in matters of common law negligence.

The proposed subsection contemplates that an occupier will be able by contract to avoid this common duty of care in certain circumstances,<sup>19</sup> or to extend his duty by contract.<sup>20</sup>

The common duty of care extends to cases involving both personal injury and property damage.

The danger causing injury or damage may be the inert physical condition of the premises or structures, or it may be an activity being carried on in the premises. In this connection reference should be made to clause (b) of subsection (1) of section 3 of the proposed Act.

The words "in so far as he is free to" are used to ensure that an occupier's power to extend, restrict, modify or exclude his duty shall be no greater than it was under common law. The words "or otherwise" are employed to enable an occupier to exclude liability not only by agreement but also, for example, by the exhibition of a notice disclaiming liability for injury, or by the provisions of any by-law, rule or regulation which the occupier may have power to make.<sup>21</sup>

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<sup>19</sup> *E.g.*, landlord and tenant.

<sup>20</sup> *E.g.*, a contract of carriage. See subsection (2) of section 3 of the proposed Act.

<sup>21</sup> *Ashdown v. Samuel Williams*, [1957] 1 All E.R. 35.

Subsection (3) of section 2 of the English Act goes further than this proposed Act, since it provides a list of "circumstances" which must be considered by a court in determining whether the common duty of care has been exercised by the occupier. The Commission felt that such an approach was too restrictive in that a court may wish to consider other circumstances in determining whether an occupier has discharged the common duty of care.

This section should allow a court to consider all the circumstances of the case. The expected judicial approach envisaged by the Commission would be the same approach that the courts have been using in matters of ordinary negligence. The test of foreseeability is still applicable. For example, in normal circumstances, an occupier would not reasonably be expected to foresee the presence of a burglar on his premises late at night.

### *Section 3 (1) (b)*

*This common duty of care shall apply whether the potential danger to a person entering on the premises, or his property, is caused by the condition of such premises, or whether it is caused by the activity carried on in such premises.*

#### COMMENT

Comparable provisions are not found in any of the other Acts. While the application of the proposed Act, by reason of the general wording of subsection (2) of section 2, would in all probability be held to apply to activities on the premises as well as the static condition of the premises, the Commission is of the view that it is important to make it clear that the Act does apply in both situations.<sup>22</sup>

### *Section 3 (2)*

*Where an occupier is free to extend, restrict, modify, or exclude his duty to any person entering on the premises, by express agreement or express stipulation, the occupier must take reasonable steps to bring such restriction, modification, or exclusion, to the attention of such person.*

#### COMMENT

Comparable provisions are not contained in any of the other Acts.

Whether reasonable steps have been taken to bring an exclusion or modification to the attention of the person entering on the premises is a

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<sup>22</sup>It has been suggested that despite the reference to "things done or omitted to be done" in the English Act, the language of the English Act restricts its application to the duty owed by occupiers in respect of defects in the condition of the premises, and excludes from its application their duty in respect of operations or activities carried out on the premises. See Odgers, *Occupiers' Liability: A Further Comment*, (1957) Camb. L. J. 39; *The Occupiers' Liability Bill*, (1957) 107, The Law Journal 308.

question of fact depending on all the circumstances, such as the position of a notice, its wording, and the age and understanding of the person entering the premises.

In some circumstances involving the alteration or exclusion of an occupier's duty by agreement or contract, the "ticket cases" would become material in the determination of the effect of the agreement on liability. Courts have stressed in the past, in these cases, that if a significant reduction in common law rights is provided by the wording, the person issuing the ticket is obliged to bring the wording to the attention of the person to whom it is issued.<sup>23</sup>

The words "where an occupier is free to" are used to ensure that an occupier's power to extend, restrict, modify or exclude his duty shall be no greater than it was under the common law. In this connection the English Court of Appeal held in *Ashdown v. Samuel Williams*<sup>24</sup> that an occupier was not liable to a licensee because: (1) the conditions excluding liability on which she was allowed to be on the land had been sufficiently brought to her attention by the posting of a notice; (2) having read enough of the notice to know that she was on the land at her own risk, she was bound by the terms of the notice, although she had not read the whole of it; and (3) the words of the notice were sufficient to exclude liability not only for dangers of the property in its static condition, but also for activities carried on negligently.

In Canada, there are many cases on exculpatory clauses in contracts, and the effect of such notices as "cars stored at owner's risk". Unfortunately, there have only been a few judicial decisions which deal with exculpatory clauses in relation to the law of occupiers' liability.<sup>25</sup>

It is for these reasons that the Commission includes this subsection in the proposed Act, to give effect to what appears to be the common law on the subject.

### Section 3 (3)

*Nothing in this Act shall relieve an occupier of premises of any duty to show in any particular case, any higher standard of care which in that case is incumbent on him by virtue of any enactment or rule of law imposing special standards of care on particular classes of persons.*

#### COMMENT

Comparable provisions are found in subsection (2) of section 2 of the Scottish Act, and subsection (4) of section 1 of the Uniform Act. There are no similar sections in the English or New Zealand Acts.

<sup>23</sup> *Ashdown v. Samuel Williams*, [1957] 1 All E.R. 35; *Parker v. South Eastern Railway Co.* (1877), 2 C.P.D. 416; *Henson v. London and North Eastern Railway Co.*, [1946] 1 All E.R. 653.

<sup>24</sup> [1957] 1 All E.R. 35.

<sup>25</sup> *Richardson v. St. James Apartments* (1963), 38 D.L.R. (2d) affd. (1963), 40 D.L.R. (2d) 297; *Beauchamp v. Consolidated Paper*, [1961] S.C.R. 664.



There appears to be no extra-judicial comment as to why a comparable provision was not included in the English Act.

In 1964, the English Court of Appeal appeared to hold, inferentially, that a master owes a higher duty to his servant than an occupier owes to a "visitor" under the English Act.<sup>26</sup>

The comments of Viscount Simonds in an earlier House of Lords decision warrant consideration:<sup>27</sup>

Just as the law imposes a certain standard of care on an employer in relation to his workman, so it imposes on the occupier of land a certain standard of care in relation to those who enter on it, and in this regard there were refinements which may now be forgotten. It may well be that the standard of reasonable care in both relations is in certain circumstances the same. It may, too, be useful to argue by way of analogy from one to another. But I would deprecate any direct appeal to cases between invitor and invitee for the purpose of determining the measure of responsibility of an employer to his workman.

The English position appears to be based on judicial opinion that the *Occupiers' Liability Act* has no effect on situations where there is a higher standard of care imposed on special classes of persons. This still creates an area of doubt, and for that reason, the Commission feels that this proposed subsection is necessary.

## LIABILITY IN CONTRACT SECTIONS

### *Section 4 (1)*

*Liability of an occupier under this Act towards any persons entering on the premises shall not be restricted, modified, or excluded by the provisions of any contract to which such person is not privy.*

## COMMENT

Comparable provisions are contained in subsection (1) of section 3 of the English Act, and subsection (1) of section 3 of the New Zealand Act, which refer to "strangers to the contract". There are no similar provisions in the Scottish Act or the Uniform Act, although subsection (2) of section 2 of the Uniform Act may be interpreted in the same way as this proposed subsection.

The Commission desires to embody in the proposed Act the common law rule that a person who is not a party to a contract should not be bound by the terms thereof.

<sup>26</sup> *Savory v. Holland*, [1964] 3 All E.R. 18.

<sup>27</sup> *Davie v. New Merton Board Mills Ltd.*, [1959] A.C. 604 at p. 619.

Leases between landlord and tenant would be covered by this proposed subsection, although that relationship is given more attention in section 5 of the proposed Act.

The effect of such conditions in the lease on a third person is more particularly referred to in subsequent subsections of the proposed Act.

#### *Section 4 (2)*

*Where an occupier is bound by contract to permit persons who are not privy to the contract to enter or use the premises, the duty of care which he owes to them cannot be restricted or excluded by that contract.*

#### COMMENT

There are no comparable provisions in the Scottish Act. Subsection (1) of section 3 of the English Act, subsection (1) of section 5 of the New Zealand Act, and subsection (2) of section 2 of the Uniform Act have a similar effect.

The proposed subsection covers the landlord and tenant relation where a landlord is the occupier of entrance halls, stairways, elevators, and other similar areas.

Such covenants and conditions would not affect the rights of a third person in any action against either a tenant or a landlord in his capacity as an occupier.

#### *Section 4 (3)*

*A contract shall not by virtue of this Act have the effect, unless it expressly so provides, of making an occupier who has taken reasonable care, liable to any person entering on the premises, not privy to the contract, for dangers due to the faulty execution of any work of construction, maintenance or repair, or other like operation by persons other than himself, his servants, and persons acting under his direction and control.*

#### COMMENT

Comparable provisions are found in subsection (2) of section 3 of the English Act and subsection (2) of section 5 of the New Zealand Act. There are no corresponding provisions in the Scottish Act or the Uniform Act.

This subsection is intended to preserve the accepted right of an occupier to avoid liability for the acts of independent contractors, or

persons for whom he is not responsible, vicariously or otherwise. The Commission is aware of exceptions to the common law rule which have left doubt as to the scope of the original rule.<sup>28</sup>

#### Section 4 (4)

*Where damage to any person entering on the premises is caused by the negligence of an independent contractor employed by an occupier, the occupier shall not on that account be liable, if in all the circumstances he had acted reasonably in entrusting the work to the independent contractor, if he had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done, and if it was reasonable that the work performed by the independent contractor should have been undertaken.*

#### COMMENT

Comparable, although not identical, provisions are found in subsection (4) of section 2 of the English Act and subsection (6) of section 4 of the New Zealand Act. There are no similar provisions in the Scottish Act or the Uniform Act.

This proposed subsection attempts to codify the exceptions to the general rule<sup>29</sup> which have applied where independent contractors have been engaged by the occupier to perform work on the occupier's premises.

The English Act and the New Zealand Act did not attempt to cover the situation where the mere entry on a given type of work, in itself, creates a substantial risk of harm to persons entering the premises. These are so-called extra-hazardous activities, and in such cases courts in Canada have imposed liability on the occupier even where a competent independent contractor is performing the work.<sup>30</sup> This is the Commission's reason for including the last clause in this proposed subsection.

Because there are a number of conflicting cases relating to independent contractors,<sup>31</sup> the Commission intends that this subsection convey, by the use of the words "shall not on that account", that other circumstances may have a direct bearing on whether an occupier could be liable for acts committed by independent contractors.

<sup>28</sup> *Hammond v. Davidson* (1940), 1 W.W.R. 480; *Wilkinson v. Rea*, [1941] 2 All E.R. 50; *Thomson v. Cremin*, [1953] 2 All E.R. 1185; *Hillman v. McIntosh*, [1959] S.C.R. 384.

<sup>29</sup> *Haseldine v. Daw*, [1941] 2 K.B. 343.

<sup>30</sup> *Custom Ceilings v. S. W. Fleming* (1970), 12 D.L.R. (3d) 209; *Randall's Paints Ltd. v. Tanner*, [1969] 2 O.R. 169; *Savage v. Wilby*, [1954] S.C.R. 376.

<sup>31</sup> *Haseldine v. Daw*, [1941] 2 K.B. 343; *Davie v. New Merton Board Mills Ltd.*, [1959] A.C. 604; *Thomson v. Cremin*, [1953] 2 All E.R. 1185; *Hillman v. McIntosh*, [1959] S.C.R. 384.



## Section 4 (5)

*Where damage to any person entering on the premises is caused by the negligence of an independent contractor employed by an occupier, and there is more than one occupier of the premises, any benefit accruing to an occupier by reason of the provisions of subsection (4) of section 4 shall accrue to all such occupiers of the premises.*

## COMMENT

There are no comparable provisions in any of the three existing Acts or the Uniform Act.

The Commission was concerned that the proposed Act, without the inclusion of this subsection, would provide an anomaly in situations where there is more than one occupier of the premises. If one occupier employs an independent contractor to perform work and satisfies the requirements of subsection (4) of section 4, then another occupier should be entitled to rely on that fact in defending any action brought by a person suffering damage as a result of the acts of the independent contractor.

## Section 4 (6)

*Nothing in this section shall affect any statutory provision in any other Act which provides that an occupier is liable for the negligence of an independent contractor.*

## COMMENT

There are no comparable provisions in any of the three existing Acts or the Uniform Act.

The Commission recognizes that some statutes may be construed as creating a "non-delegable" duty giving rise to liability for the negligence of others, including an independent contractor.

This proposed subsection makes it clear that the proposed Act should not affect any such statute.

## Section 4 (7)

*This section, in so far as it prevents the duty of care owed by an occupier to any person entering on the premises from being restricted or excluded, applies to contracts entered into both before and after the commencement of this Act, but in so far as it enlarges the duty owed by an occupier to any person entering on the premises, it shall have effect only in relation to obligations which are undertaken after that commencement.*



## COMMENT

Comparable provisions are found in subsection (5) of section 3 of the English Act and subsection (5) of section 5 of the New Zealand Act. There are no comparable provisions in the Scottish or Uniform Acts.

The Commission intended to consider contracts and tenancies separately, and this is the reason for the difference in wording between this subsection and the proposed subsection (6) of section 5 relating to tenancies.

*Section 5 (1)*

*Where premises are occupied or used by virtue of a tenancy under which the landlord is responsible for the maintenance or repair of the premises, it shall be the duty of the landlord to show towards any persons who or whose property may from time to time be on the premises, the same care in respect of dangers arising from any failure on his part in carrying out his responsibility, as is required by virtue of the provisions of this Act to be shown by an occupier of premises towards persons entering on them.*

## COMMENT

Comparable provisions are found in subsection (1) of section 4 of the English Act, subsection (1) of section 8 of the New Zealand Act, subsection (1) of section 3 of the Scottish Act, and subsection (1) of section 3 of the Uniform Act.

The purpose of this proposed subsection is to reverse the common law rule that the lessor of premises is under no liability to any person lawfully on the premises, other than a tenant, for damages caused by the breach of the lessor's covenant to repair.<sup>32</sup>

This subsection would not affect the liability of a landlord who gratuitously effects repairs.<sup>33</sup>

*Section 5 (2)*

*Where premises are occupied by virtue of a sub-tenancy, the foregoing subsection shall apply to any landlord who is responsible for the maintenance or repair of the premises comprised in the sub-tenancy.*

<sup>32</sup>*Cavalier v. Pope*, [1906] A.C. 428; *Ryall v. Kidwell*, [1913] 3 K.B. 135.

<sup>33</sup>*Malone v. Laskey*, [1907] 2 K.B. 141; *Ball v. London County Council*, [1949] 1 All E.R. 1056.

## COMMENT

This proposed subsection is identical to subsection (2) of section 3 of the Uniform Act, and similar to subsection (2) of section 4 of the English Act, subsection (2) of section 8 of the New Zealand Act and subsection (2) of section 3 of the Scottish Act.

This proposed subsection will assist the court in determining liability in situations where there are head leases and sub-leases.

Both section 5 of the English Act and section 8 of the New Zealand Act provide at some length for circumstances involving superior landlords and sub-leases. In the opinion of this Commission, those further provisions are redundant in view of the land development situation prevailing in Ontario.

*Section 5 (3)*

*For the purposes of this section, a landlord shall not be deemed to have made default in carrying out any obligation to the occupier of the premises, unless his default is such as to be actionable at the suit of the occupier.*

## COMMENT

This proposed subsection is similar to subsection (4) of section 3 of the Uniform Act, subsection (4) of section 4 of the English Act, and subsection (4) of section 8 of the New Zealand Act. There is no corresponding provision in the Scottish Act.

This provision will assist a court in determining whether the lessor's default was sufficient to found tortious liability to persons entering the premises.

*Section 5 (4)*

*Nothing in this section shall relieve a landlord of any duty which he is under apart from this section.*

## COMMENT

This proposed subsection is similar to subsection (5) of section 3 of the Uniform Act, subsection (3) of section 3 of the Scottish Act, subsection (6) of section 4 of the English Act, and subsection (6) of section 8 of the New Zealand Act.

This proposed subsection represents a saving provision to indicate that the law of landlord and tenant remains paramount.

### Section 5 (5)

*For the purposes of this section, obligations imposed by any enactment in virtue of the tenancy, shall be treated as imposed by the tenancy, and "tenancy" includes a statutory tenancy, an implied tenancy, and any contract conferring the right of occupation, and "landlord" shall be construed accordingly.*

#### COMMENT

This proposed subsection is similar to subsection (6) of section 3 of the Uniform Act, subsection (4) of section 3 of the Scottish Act, subsection (7) of section 4 of the English Act, and subsection (7) of section 8 of the New Zealand Act.

### Section 5 (6)

*This section applies to tenancies created before the commencement of this Act, as well as those created after the commencement.*

#### COMMENT

This proposed subsection is similar to subsection (7) of section 3 of the Uniform Act, subsection (8) of section 4 of the English Act, subsection (5) of section 3 of the Scottish Act, and subsection (8) of section 8 of the New Zealand Act.

## GENERAL SECTIONS

### Section 6

*Nothing in this Act shall impose any obligation on an occupier to any person entering on the premises in respect of risks willingly accepted by that person.*

#### COMMENT

Comparable provisions are found in subsection (5) of section 2 of the English Act, subsection (3) of section 2 of the Scottish Act, subsection (7) of section 4 of the New Zealand Act, and subsection (3) of section 2 of the Uniform Act.

This proposed section attempts to preserve the rules of common law concerning the application of the legal maxim "*volenti non fit injuria*", even though its scope has been significantly narrowed by recent Canadian decisions.<sup>34</sup>

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<sup>34</sup>*Car & General Insurance Co. v. Seymour and Maloney* (1956), 2 D.L.R. (2d) 369; *Hambly v. Shepley*, [1967] 2 O.R. 217; *Eid v. Dumas* (1969), 5 D.L.R. (3d) 561. These decisions show that a defence based upon voluntary assumption of risk is becoming increasingly difficult to establish.



The Commission is aware that this terminology may merely perpetuate some of the difficulties that the courts have experienced in determining what it means to be *volens*. However, the Commission prefers to utilize this terminology for the sake of uniformity rather than certainty.

## Section 7

*The provisions of The Negligence Act shall apply with respect to matters of contributory negligence between an occupier and persons entering on the premises, and with respect to contribution between tortfeasors where there is more than one occupier of the premises.*

### COMMENT

Comparable provisions are contained in subsection (8) of section 4 and subsections (1) and (2) of section 6, all of the New Zealand Act, and section 4 of the Uniform Act. There are no corresponding provisions in the English or Scottish Acts.

Related to the matter of knowledge of risk and its acceptance is the concept of contributory negligence. The decision in *Indemaur v. Dames*<sup>35</sup> can be interpreted to mean that contributory negligence by a person entering upon premises bars an action by him against the occupier. But in England at the time that case was decided contributory negligence was a complete defence.

Since the passage of *The Negligence Act*,<sup>36</sup> apportionment by a court is required, and Canadian courts have utilized contributory negligence legislation to reduce the recovery of plaintiffs in actions founded on occupiers' liability.<sup>37</sup>

Although it is likely that the courts would apply *The Negligence Act* to situations to which the proposed Act would apply, it is preferable to make specific provision for this, as has been done in the New Zealand Act.

The second clause of this section attempts to deal with situations where there is more than one occupier, and where both occupiers or all occupiers may be liable. This was the situation contemplated by Lord Denning in *Wheat v. Lacon*<sup>38</sup> discussed under section 1 of the proposed draft Act.

<sup>35</sup>*Indemaur v. Dames* (1866), L.R. 1 C.P. 274, (1867), L.R. 2 C.P. 311.

<sup>36</sup>*The Negligence Act*, R.S.O. 1970, c. 296.

<sup>37</sup>*Whitehead v. North Vancouver*, [1939] 3 D.L.R. 83; *Brown v. B.F. Theatres*, [1947] S.C.R. 486.

<sup>38</sup>*Wheat v. Lacon*, [1966] A.C. 552.

## Section 8

*Nothing in this Act shall vary, modify or restrict the special rights and liabilities incident to a master-servant relation where it exists between the parties.*

### COMMENT

There are no comparable sections in the three existing Acts and the draft Uniform Act.

This section makes paramount the law involving the master and servant relation, and makes explicit what would appear to be implicit in subsection (3) of section 3 of the proposed Act.

The Commission is of the opinion that the proposed legislation should not affect the duties of a master to his servant, these duties having developed outside the field of occupiers' liability. In Ontario, although the provisions of, and benefits under, *The Workmen's Compensation Act*,<sup>39</sup> may make the proposed section of no great practical significance, the section is inserted to remove all doubt that the proposed Act does not apply to that relation.

## Section 9

*This Act shall not affect the obligations of any person under or by virtue of The Innkeeper's Act, under or by virtue of any contract for the hire of, or for the carriage for reward of persons or goods in any vehicle, vessel, aircraft or other means of transport, or under or by virtue of any contract of bailment.*

### COMMENT

Comparable provisions are contained in subsection (3) of section 5 of the English Act and section 9 of the New Zealand Act.

This section attempts to preserve the legal obligations already existing in these unique relationships.

The laws of bailment, innkeeper's liability and safe carriage create higher duties than those resulting from mere occupation of premises, and should therefore be excluded from the proposed Act.

References should be made to the provisions of section 2 of the proposed Act which relate to its application to certain structures such as ships, vessels, trains, railway cars, vehicles, and aircraft.

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<sup>39</sup>*The Workmen's Compensation Act*, R.S.O. 1970, c. 505.

## Section 10

*This Act binds the Crown, subject to The Proceedings Against the Crown Act.*

## COMMENT

Comparable provisions are contained in section 6 of the English Act, section 4 of the Scottish Act, section 10 of the New Zealand Act, and subsection (1) of section 5 of the Uniform Act.

At common law, the Crown could not be held liable in negligence. The *Exchequer Court Act*<sup>40</sup> for many years had a provision imposing liability in certain circumstances for negligence of federal Crown servants, but this provision was repealed in 1952. The situation is now covered by the *Crown Liability Act*.<sup>41</sup>

Some claims against the Crown under the *Exchequer Court Act* were based on the law of occupiers' liability.<sup>42</sup>

The *English Crown Proceedings Act, 1947*, was the model for a Uniform Crown Proceedings Act adopted in 1950 by the Conference of Commissioners on Uniformity of Legislation in Canada. Ontario's *Proceedings Against the Crown Act*,<sup>43</sup> and Canada's *Crown Liability Act* are, for all relevant purposes, the same as the English Act.

The Commission is unaware of any reported decisions relating to occupiers' liability under the provincial Act, although there have been a number of such cases under the federal Act.<sup>44</sup>

The Commission is of the view that the proposed Act should bind the Crown, just as the Acts of England, Scotland and New Zealand now do.

## Section 11

*This Act does not apply to the Crown or to any municipality, where the Crown or the municipality is an occupier of a public highway or a public road.*

<sup>40</sup>The *Exchequer Court Act*, R.S.C. 1970, c. E-11.

<sup>41</sup>The *Crown Liability Act*, R.S.C. 1970, c. C-38.

<sup>42</sup>*Brebner v. The King* (1913), 14 D.L.R. 397; *Northrup v. The King* (1917), 37 D.L.R. 483; *Lajoie v. The King* (1921), 69 D.L.R. 147; *MacDonald v. The King*, [1951] Ex. C.R. 293.

<sup>43</sup>The *Proceedings Against the Crown Act*, R.S.O. 1970, c. 365.

<sup>44</sup>*Deslauriers v. The Queen*, [1963] Ex. C.R. 289; *Nord-Deutsche v. The Queen*, [1969] 1 Ex. C.R. 117; *Alexander v. The Queen* (1960), 23 D.L.R. (2d) 369; *Hendry v. The Queen*, [1965] 1 Ex. C.R. 392; *Kerr v. The Queen*, [1968] 1 Ex. C.R. 220.



## COMMENT

There is no comparable provision in the three existing Acts, although subsection (2) of section 5 of the Uniform Act proposes that a comparable section be enacted.

In Ontario, public highways and roads are created under statutory authority, and are “vested” in, and maintained by, either the Crown in the right of the Province, or a municipality. *The Municipal Act*,<sup>45</sup> and *The Highway Improvement Act*<sup>46</sup> provide in detail for the responsibility of the municipalities and the Crown in regard to the condition of repair and non-repair of public roads and highways. The proposed Act does not vary the rights and liabilities which have been established by the aforementioned Acts.

It should be added that the definition of “highway” under *The Highway Traffic Act*<sup>47</sup> “includes a common and public highway, street, avenue, parkway, driveway, square, place, bridge, viaduct or trestle, designed and intended for, or used by, the general public for the passage of vehicles”. This definition may be wide enough to include parking lots provided in parking plazas and parking garages. These, however, will remain within the proposed Act, unless the Crown is the occupier.

## Section 12

*This Act does not affect rights and liabilities of persons in respect of causes of action arising before this Act comes into force.*

## COMMENT

This section has been inserted in order that the proposed Act will not have retroactive application. The material time is when the cause of action arose, not when the action was commenced against the occupier. In this regard, reference should be made to the proposed subsection (7) of section 4 and the proposed subsection (6) of section 5 of this Act, where contracts and tenancies are dealt with.

## Section 13

*This Act comes into force on the                      day of  
197 .*

## Section 14

*This Act may be cited as The Occupiers' Liability Act, 197*

<sup>45</sup> *The Municipal Act*, R.S.O. 1970, c. 284.

<sup>46</sup> *The Highway Improvement Act*, R.S.O. 1970, c. 201.

<sup>47</sup> *The Highway Traffic Act*, R.S.O. 1970, c. 202, s. 1 (1) (11).



# THE COMMISSION'S DRAFT ACT: COMPLETE TEXT

The text of the draft Act proposed by this Commission is as follows:

## THE OCCUPIERS' LIABILITY ACT

SECTION 1            In this Act,

(1)            "occupier" means

- (a) a person who is in physical possession of premises, or
- (b) a person who has responsibility for, and control over the condition of premises, the activities there carried on, and persons allowed to enter premises

notwithstanding that one or more other persons are also occupiers.

(2)            "premises" means lands and structures or either of them.

SECTION 2(1)        The provisions of this Act apply, in place of the rules of the common law, for the purpose of determining the care that an occupier is required to show towards persons entering on the premises in respect of dangers to them or to their property, and to the property of persons who have not themselves entered on the premises, that are due to the state of the premises, or to anything done or omitted to be done thereon, and for which he is in law responsible.

(2)            The provisions of this Act apply in like manner and to the same extent as in subsection (1) to persons entering on:

- (a) ships and vessels;
- (b) trailers and portable structures designed or used for a residence, business or shelter; and
- (c) trains, railway cars, vehicles and aircraft, except while in operation,

and to their property thereon, and to the property of persons who have not themselves entered thereon.

SECTION 3(1)(a)    An occupier of premises owes a common duty of care to all persons entering on the premises, except in so far as he is free to and does extend, restrict, modify, or exclude his duty by express agreement or otherwise, which duty is to take such care as in all the circum-

stances of the case is reasonable, to see that the person and his property will be reasonably safe in using the premises for the purposes contemplated by the occupier.

- (b) This common duty of care shall apply whether the potential danger to a person entering on the premises, or his property, is caused by the condition of such premises, or whether it is caused by the activity carried on in such premises.

SECTION 3(2) Where an occupier is free to extend, restrict, modify, or exclude his duty to any person entering on the premises, by express agreement or express stipulation, the occupier must take reasonable steps to bring such restriction, modification, or exclusion, to the attention of such person.

- (3) Nothing in this Act shall relieve an occupier of premises of any duty to show in any particular case, any higher standard of care which in that case is incumbent on him by virtue of any enactment or rule of law imposing special standards of care on particular classes of persons.

SECTION 4(1) Liability of an occupier under this Act towards any persons entering on the premises shall not be restricted, modified, or excluded by the provisions of any contract to which such person is not privy.

- (2) Where an occupier is bound by contract to permit persons who are not privy to the contract to enter or use the premises, the duty of care which he owes to them cannot be restricted or excluded by that contract.
- (3) A contract shall not by virtue of this Act have the effect, unless it expressly so provides, of making an occupier who has taken reasonable care, liable to any person entering on the premises, not privy to the contract, for dangers due to the faulty execution of any work of construction, maintenance or repair, or other like operation by persons other than himself, his servants, and persons acting under his direction and control.
- (4) Where damage to any person entering on the premises is caused by the negligence of an independent contractor employed by an occupier, the occupier shall not on that account be liable, if in all the circumstances he had acted reasonably in entrusting the work to the independent contractor, if he had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been

properly done, and if it was reasonable that the work performed by the independent contractor should have been undertaken.

- (5) Where damage to any person entering on the premises is caused by the the negligence of an independent contractor employed by an occupier, and there is more than one occupier of the premises, any benefit accruing to an occupier by reason of the provisions of subsection (4) of section 4 shall accrue to all such occupiers of the premises.
- (6) Nothing in this section shall affect any statutory provision in any other Act which provides that an occupier is liable for the negligence of an independent contractor.
- (7) This section, in so far as it prevents the duty of care owed by an occupier to any person entering on the premises from being restricted or excluded, applies to contracts entered into both before and after the commencement of this Act, but in so far as it enlarges the duty owed by an occupier to any person entering on the premises, it shall have effect only in relation to obligations which are undertaken after that commencement.

- SECTION 5(1) Where premises are occupied or used by virtue of a tenancy under which the landlord is responsible for the maintenance or repair of the premises, it shall be the duty of the landord to show towards any persons who or whose property may from time to time be on the premises, the same care in respect of dangers arising from any failure on his part in carrying out his responsibility, as is required by virtue of the provisions of this Act to be shown by an occupier of premises towards persons entering on them.
- (2) Where premises are occupied by virtue of a sub-tenancy, the foregoing subsection shall apply to any landlord who is responsible for the maintenance or repair of the premises comprised in the sub-tenancy.
  - (3) For the purposes of this section, a landlord shall not be deemed to have made default in carrying out any obligation to the occupier of the premises, unless his default is such as to be actionable at the suit of the occupier.
  - (4) Nothing in this section shall relieve a landlord of any duty which he is under apart from this section.



- (5) For the purposes of this section, obligations imposed by any enactment in virtue of the tenancy, shall be treated as imposed by the tenancy, and "tenancy" includes a statutory tenancy, an implied tenancy, and any contract conferring the right of occupation, and "landlord" shall be construed accordingly.
- (6) This section applies to tenancies created before the commencement of this Act, as well as those created after the commencement.

SECTION 6      Nothing in this Act shall impose any obligation on an occupier to any person entering on the premises in respect of risks willingly accepted by that person.

SECTION 7      The provisions of *The Negligence Act* shall apply with respect to matters of contributory negligence between an occupier and persons entering on the premises, and with respect to contribution between tort feasons where there is more than one occupier of the premises.

SECTION 8      Nothing in this Act shall vary, modify or restrict the special rights and liabilities incident to a master-servant relation where it exists between the parties.

SECTION 9      This Act shall not affect the obligations of any person under or by virtue of *The Innkeeper's Act*, under or by virtue of any contract for the hire of, or for the carriage for reward of persons or goods in any vehicle, vessel, aircraft or other means of transport, or under or by virtue of any contract of bailment.

SECTION 10     This Act binds the Crown, subject to *The Proceedings Against the Crown Act*.

SECTION 11     This Act does not apply to the Crown or to any municipality, where the Crown or the municipality is an occupier of a public highway or a public road.

SECTION 12     This Act does not affect rights and liabilities of persons in respect of causes of action arising before this Act comes into force.

SECTION 13     This Act comes into force on the      day of  
197


SECTION 14     This Act may be cited as *The Occupiers' Liability Act*,  
197

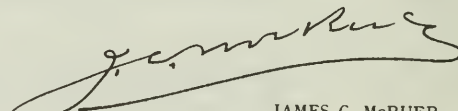
## CONCLUSION

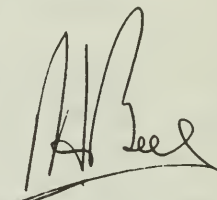
The Commission is of the view that the common law governing occupiers' liability is no longer adequate. The proposed Act set out in this Report would serve as an instrument not only for clarifying an uncertain and therefore unsatisfactory branch of the law, but also for providing the courts with the means for applying modern concepts of the law of negligence in an area where modernization is very much required. The Commission recommends its adoption.


In addition to acknowledging the assistance provided by a study of the legislation and reports mentioned in the Introduction to this Report, the Commission wishes to express its gratitude to Mr. Barry A Percival, a Toronto Barrister and Solicitor. Mr. Percival served as the Commission's Research Supervisor and his abilities and insight have been of great value throughout the course of this project.

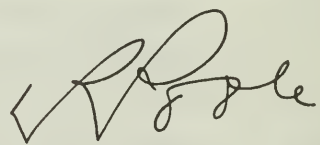
All of which is respectfully submitted.

  
H. ALLAN LEAL,  
*Chairman*

  
JAMES C. McRUER,  
*Commissioner*

  
RICHARD A. BELL,  
*Commissioner*

  
W. GIBSON GRAY,  
*Commissioner*

  
WILLIAM R. POOLE,  
*Commissioner*

January 11, 1972.

## APPENDIX A

### OCCUPIERS' LIABILITY ACT, 1957

#### ARRANGEMENT OF SECTIONS

##### LIABILITY IN TORT

###### Section

1. Preliminary.
2. Extent of occupier's ordinary duty.
3. Effect of contract on occupier's liability to third party.
4. Landlord's liability in virtue of obligation to repair.

##### LIABILITY IN CONTRACT

5. Implied term in contract.

##### GENERAL

6. Application to Crown.
7. Powers of Parliament of Northern Ireland.
8. Short title, etc.

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An Act to amend the law of England and Wales as to the liability of occupiers and others for injury or damage resulting to persons or goods lawfully on any land or other property from dangers due to the state of the property or to things done or omitted to be done there, to make provision as to the operation in relation to the Crown of laws made by the Parliament of Northern Ireland for similar purposes or otherwise amending the law of tort, and for purposes connected therewith.

[6th June, 1957]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

##### LIABILITY IN TORT

1.—(1) The rules enacted by the two next following sections shall have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in respect of dangers due to the state of the premises or to things done or omitted to be done on them.

(2) The rules so enacted shall regulate the nature of the duty imposed by law in consequence of a person's occupation or control of premises and of any invitation or permission he gives (or is to be treated as giving) to another to enter or use the premises, but they shall not alter the rules of the common law as to the persons on whom a duty is so imposed or to whom it is owed; and accordingly for the purpose of the rules so enacted the persons who are to be treated as an occupier and as his visitors are the same (subject to subsection (4) of this section) as the persons who would at common law be treated as an occupier and as his invitees or licensees.

(3) The rules so enacted in relation to an occupier of premises and his visitors shall also apply, in like manner and to the like extent as the principles applicable at common law to an occupier of premises and his invitees or licensees would apply, to regulate—

- (a) the obligations of a person occupying or having control over any fixed or moveable structure, including any vessel, vehicle or aircraft; and
- (b) the obligations of a person occupying or having control over any premises or structure in respect of damage to property, including the property of persons who are not themselves his visitors.

(4) A person entering any premises in exercise of rights conferred by virtue of an access agreement or order under the National Parks and Access to the Countryside Act, 1949, is not, for the purposes of this Act, a visitor of the occupier of those premises.

2.—(1) An occupier of premises owes the same duty, the “common duty of care”, to all his visitors, except in so far as he is free to and does extend, restrict, modify or exclude his duty to any visitor or visitors by agreement or otherwise.

(2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

(3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor, so that (for example) in proper cases—

- (a) an occupier must be prepared for children to be less careful than adults; and
- (b) an occupier may expect that a person, in the exercise of his calling, will appreciate and guard against any special risks ordinarily incident to it, so far as the occupier leaves him free to do so.



(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances, so that (for example)—

- (a) where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe; and
- (b) where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, maintenance or repair by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.

(5) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor (the question whether a risk was so accepted to be decided on the same principles as in other cases in which one person owes a duty of care to another).

(6) For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not.

**3.—**(1) Where an occupier of premises is bound by contract to permit persons who are strangers to the contract to enter or use the premises, the duty of care which he owes to them as his visitors cannot be restricted or excluded by that contract, but (subject to any provision of the contract to the contrary) shall include the duty to perform his obligations under the contract, whether undertaken for their protection or not, in so far as those obligations go beyond the obligations otherwise involved in that duty.

(2) A contract shall not by virtue of this section have the effect, unless it expressly so provides, of making an occupier who has taken all reasonable care answerable to strangers to the contract for dangers due to the faulty execution of any work of construction, maintenance or repair or other like operation by persons other than himself, his servants and persons acting under his direction and control.

(3) In this section “stranger to the contract” means a person not for the time being entitled to the benefit of the contract as a party to it or as the successor by assignment or otherwise of a party to it, and accordingly includes a party to the contract who has ceased to be so entitled.

(4) Where by the terms or conditions governing any tenancy (including a statutory tenancy which does not in law amount to a tenancy) either the landlord or the tenant is bound, though not by contract, to permit persons to enter or use premises of which he is the occupier, this section shall apply as if the tenancy were a contract between the landlord and the tenant.

(5) This section, in so far as it prevents the common duty of care from being restricted or excluded, applies to contracts entered into and tenancies created before the commencement of this Act, as well as to those entered into or created after its commencement; but, in so far as it enlarges the duty owed by an occupier beyond the common duty of care, it shall have effect only in relation to obligations which are undertaken after that commencement or which are renewed by agreement (whether express or implied) after that commencement.

4.—(1) Where premises are occupied by any person under a tenancy which puts on the landlord an obligation to that person for the maintenance or repair of the premises, the landlord shall owe to all persons who or whose goods may from time to time be lawfully on the premises the same duty, in respect of dangers arising from any default by him in carrying out that obligation, as if he were an occupier of the premises and those persons or their goods were there by his invitation or permission (but without any contract).

(2) Where premises are occupied under a sub-tenancy, the foregoing subsection shall apply to any landlord of the premises (whether the immediate or a superior landlord) on whom an obligation to the occupier for the maintenance or repair of the premises is put by the sub-tenancy, and for that purpose any obligation to the occupier which the sub-tenancy puts on a mesne landlord of the premises, or is treated by virtue of this provision as putting on a mesne landlord, shall be treated as put by it also on any landlord on whom the mesne landlord's tenancy puts the like obligation towards the mesne landlord.

(3) For the purposes of this section, where premises comprised in a tenancy (whether occupied under that tenancy or under a sub-tenancy) are put to a use not permitted by the tenancy, and the landlord of whom they are held under the tenancy is not debarred by his acquiescence or otherwise from objecting or from enforcing his objection, then no persons or goods whose presence on the premises is due solely to that use of the premises shall be deemed to be lawfully on the premises as regards that landlord or any superior landlord of the premises, whether or not they are lawfully there as regards an inferior landlord.

(4) For the purposes of this section, a landlord shall not be deemed to have made default in carrying out any obligation to the occupier of the premises unless his default is such as to be actionable at the suit of the occupier or, in the case of a superior landlord whose actual obligation is to an inferior landlord, his default in carrying out that obligation is actionable at the suit of the inferior landlord.

(5) This section shall not put a landlord of premises under a greater duty than the occupier to persons who or whose goods are lawfully on the premises by reason only of the exercise of a right of way or of rights conferred by virtue of an access agreement or order under the National Parks and Access to the Countryside Act, 1949.

(6) Nothing in this section shall relieve a landlord of any duty which he is under apart from this section.

(7) For the purposes of this section, obligations imposed by any enactment in virtue of a tenancy shall be treated as imposed by the tenancy; and "tenancy" includes a statutory tenancy which does not in law amount to a tenancy, and includes also any contract conferring a right of occupation, and "landlord" shall be construed accordingly.

(8) This section applies to tenancies created before the commencement of this Act, as well as to those created after its commencement.

#### LIABILITY IN CONTRACT

5.—(1) Where persons enter or use, or bring or send goods to, any premises in exercise of a right conferred by contract with a person occupying or having control of the premises, the duty he owes them in respect of dangers due to the state of the premises or to things done or omitted to be done on them, in so far as the duty depends on a term to be implied in the contract by reason of its conferring that right, shall be the common duty of care.

(2) The foregoing subsection shall apply to fixed and moveable structures as it applies to premises.

(3) This section does not affect the obligations imposed on a person by or by virtue of any contract for the hire of, or for the carriage for reward of persons or goods in, any vehicle, vessel, aircraft or other means of transport, or by or by virtue of any contract of bailment.

(4) This section does not apply to contracts entered into before the commencement of this Act.

#### GENERAL

6.—This Act shall bind the Crown, but as regards the Crown's liability in tort shall not bind the Crown further than the Crown is made liable in tort by the Crown Proceedings Act, 1947, and that Act and in particular section two of it shall apply in relation to duties under sections two to four of this Act as statutory duties.

7.—The limitation imposed by paragraph (1) of section four of the Government of Ireland Act, 1920, precluding the Parliament of Northern Ireland from making laws in respect of the Crown or property of the Crown (including foreshore vested in the Crown) shall not extend to



prevent that Parliament from amending the law of tort, or enacting provisions similar to section five of this Act, so as to bind the Crown in common with private persons; but as regards the Crown's liability in tort, no such amendments shall bind the Crown further than the Crown is made liable in tort under the law of Northern Ireland by Orders in Council under section fifty-three of the Crown Proceedings Act, 1947.

8.—(1) This Act may be cited as the Occupiers' Liability Act, 1957.

(2) This Act shall not extend to Scotland, nor to Northern Ireland except in so far as it extends the powers of the Parliament of Northern Ireland.

(3) This Act shall come into force on the first day of January, nineteen hundred and fifty-eight.



## APPENDIX B

### OCCUPIERS' LIABILITY (SCOTLAND) ACT, 1960

An Act to amend the law of Scotland as to the liability of occupiers and others for injury or damage occasioned to persons or property on any land or other premises by reason of the state of the premises or of anything done or omitted to be done thereon; and for purposes connected with the matter aforesaid.

[2nd June, 1960]

Be it enacted by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

1.—(1) The provisions of the next following sections of this Act shall have effect, in place of the rules of the common law, for the purpose of determining the care which a person occupying or having control of land or other premises (in this Act referred to as an "occupier of premises") is required, by reason of such occupation or control, to show towards persons entering on the premises in respect of dangers which are due to the state of the premises or to anything done or omitted to be done on them and for which he is in law responsible.

(2) Nothing in those provisions shall be taken to alter the rules of the common law which determine the person on whom in relation to any premises a duty to show care as aforesaid towards persons entering thereon is incumbent.

(3) Those provisions shall apply, in like manner and to the same extent as they do in relation to an occupier of premises and to persons entering thereon,

- (a) in relation to a person occupying or having control of any fixed or moveable structure, including any vessel, vehicle or aircraft, and to persons entering thereon; and
- (b) in relation to an occupier of premises or a person occupying or having control of any such structure and any property thereon, including the property of persons who have not themselves entered on the premises or structure.

2.—(1) The care which an occupier of premises is required by reason of his occupation or control of the premises, to show towards a person entering thereon in respect of dangers which are due to the state of the premises or to anything done or omitted to be done on them and for which the occupier is by law responsible shall, except in so far as he is entitled to and does extend, restrict, modify or exclude by

agreement his obligations towards that person, be such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage by reason of any such danger.

(2) Nothing in the foregoing subsection shall relieve an occupier of premises of any duty to show in any particular case any higher standard of care which in that case is incumbent on him by virtue of any enactment or rule of law imposing special standards of care on particular classes of persons.

(3) Nothing in the foregoing provisions of this Act shall be held to impose on an occupier any obligation to a person entering on his premises in respect of risks which that person has willingly accepted as his; and any question whether a risk was so accepted shall be decided on the same principles as in other cases in which one person owes to another a duty to show care.

3.—(1) Where premises are occupied or used by virtue of a tenancy under which the landlord is responsible for the maintenance or repair of the premises, it shall be the duty of the landlord to show towards any persons who or whose property may from time to time be on the premises the same care in respect of dangers arising from any failure on his part in carrying out his responsibility aforesaid as is required by virtue of the foregoing provisions of this Act to be shown by an occupier of premises towards persons entering on them.

(2) Where premises are occupied or used by virtue of a sub-tenancy, the foregoing subsection shall apply to any landlord who is responsible for the maintenance or repair of the premises comprised in the sub-tenancy.

(3) Nothing in this section shall relieve a landlord of any duty which he is under apart from this section.

(4) For the purposes of this section, any obligation imposed on a landlord by any enactment by reason of the premises being subject to a tenancy shall be treated as if it were an obligation imposed on him by the tenancy, “tenancy” includes a statutory tenancy which does not in law amount to a tenancy and includes also any contract conferring a right of occupation, and “landlord” shall be construed accordingly.

(5) This section shall apply to tenancies created before the commencement of this Act as well as to tenancies created after its commencement.

4. This Act shall bind the Crown, but as regards the liability of the Crown for any wrongful or negligent act or omission giving rise to liability in reparation shall not bind the Crown any further than the Crown is made liable in respect of such acts or omissions by the Crown Proceedings Act, 1947, and that Act and in particular section two thereof shall apply in relation to duties under section two or section three of this Act as statutory duties.

5.—(1) This Act may be cited as the Occupiers’ Liability (Scotland) Act, 1960, and shall extend to Scotland only.

(2) This Act shall come into operation at the end of the period of three months beginning with the day on which it is passed.

## APPENDIX C

### OCCUPIERS' LIABILITY

#### ANALYSIS

##### Title

1. Short Title and commencement
2. Interpretation
3. Application of next two succeeding sections
4. Extent of occupier's ordinary duty
5. Effect of contract on occupier's liability to third party
6. Contribution between landlord and tenant as joint tortfeasors
7. Occupier's duty to contractual visitors
8. Landlord's liability in virtue of obligation to repair
9. Act not to apply to certain contracts of hire or carriage, etc.
10. Act to bind the Crown

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1962, No. 31

An Act to amend the law relating to the liability of occupiers and others for injury or damage resulting to persons or goods lawfully on any land or other property from dangers due to the state of the property or to things done or omitted to be done there

[28 November 1962]

BE IT ENACTED by the General Assembly of New Zealand in Parliament assembled, and by the authority of the same, as follows:

**1. *Short Title and commencement***—(1) This Act may be cited as the Occupiers' Liability Act 1962.

(2) This Act shall come into force on the first day of January, nineteen hundred and sixty-three.

**2. *Interpretation***—In this Act, unless the context otherwise requires,—

“Premises” includes land:

“Structure” includes any vessel, vehicle, or aircraft.

Cf. Occupiers' Liability Act 1957, s. 1 (3)(a) (U.K.)

**3. *Application of next two succeeding sections***—(1) The rules enacted by sections 4 and 5 of this Act shall have effect, in place of the rules of the common law, to regulate the duty which an occupier of premises owes to his visitors in his capacity as an occupier in respect of dangers due to the state of the premises or to things done or omitted to be done on them.



(2) The rules so enacted shall regulate the nature of the duty imposed by law in consequence of a person's occupation or control of premises and of any invitation or permission he gives, or is to be treated as giving, to another to enter or use the premises, but they shall not alter the rules of the common law as to the persons on whom a duty is so imposed or to whom it is owed; and accordingly for the purpose of the rules so enacted the persons who are to be treated as an occupier and as his visitors are the same as the persons who would at common law be treated as an occupier and as his invitees or licensees.

(3) Subject to the provisions of section 9 of this Act, the rules so enacted in relation to an occupier of premises and his visitors shall also apply, in like manner and to the like extent as the principles applicable at common law to an occupier of premises and his invitees or licensees would apply, to regulate—

- (a) The obligations of a person occupying or having control over any fixed or movable structure; and
- (b) The obligations of a person occupying or having control over any premises or structure in respect of damage to property, including the property of persons who are not themselves his visitors.

Cf. Occupiers' Liability Act 1957, s. 1 (U.K.)

4. *Extent of occupier's ordinary duty*—(1) An occupier of premises owes the same duty (in this Act referred to as the common duty of care) to all his visitors, except so far as he is free to and does extend, restrict, modify, or exclude his duty to any visitor or visitors by agreement or otherwise.

(2) The common duty of care is a duty to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there.

(3) The circumstances relevant for the present purpose include the degree of care, and of want of care, which would ordinarily be looked for in such a visitor.

(4) In determining whether the occupier of premises has discharged the common duty of care to a visitor, regard is to be had to all the circumstances.

(5) Where damage is caused to a visitor by a danger of which he had been warned by the occupier, the warning is not to be treated without more as absolving the occupier from liability, unless in all the circumstances it was enough to enable the visitor to be reasonably safe.



(6) Where damage is caused to a visitor by a danger due to the faulty execution of any work of construction, reconstruction, demolition, maintenance, repair, or other like operation by an independent contractor employed by the occupier, the occupier is not to be treated without more as answerable for the danger if in all the circumstances he had acted reasonably in entrusting the work to an independent contractor and had taken such steps (if any) as he reasonably ought in order to satisfy himself that the contractor was competent and that the work had been properly done.

(7) The common duty of care does not impose on an occupier any obligation to a visitor in respect of risks willingly accepted as his by the visitor.

(8) Where the occupier fails or neglects to discharge the common duty of care to a visitor, and the visitor suffers damage as the result partly of that fault and partly of his own fault, the provisions of the Contributory Negligence Act 1947 shall apply.

(9) For the purposes of this section, persons who enter premises for any purpose in the exercise of a right conferred by law are to be treated as permitted by the occupier to be there for that purpose, whether they in fact have his permission or not.

Cf. Occupiers' Liability Act 1957, s. 2 (U.K.)

*5. Effect of contract on occupier's liability to third party—*(1) Where an occupier of premises is bound by contract to permit persons who are strangers to the contract to enter or use the premises, the common duty of care which he owes to them as his visitors cannot be restricted or excluded by that contract, but (subject to any provision of the contract to the contrary) shall include the duty to perform his obligations under the contract, whether undertaken for their protection or not, so far as those obligations go beyond the obligations otherwise involved in the common duty of care.

(2) A contract shall not by virtue of this section have the effect, unless it expressly so provides, of making an occupier who has taken all reasonable care answerable to strangers to the contract for dangers due to the faulty execution of any work of construction, reconstruction, demolition, maintenance, repair, or other like operation by persons other than himself, his servants, and persons acting under his direction and control.

(3) In this section the expression "stranger to the contract" means a person not for the time being entitled to the benefit of the contract as a party to it or as the successor by assignment or otherwise of a party to it, and accordingly includes a party to the contract who has ceased to be so entitled.

(4) Where by the terms or conditions governing any tenancy (including a statutory tenancy which does not in law amount to a tenancy) either the landlord or the tenant is bound, though not by contract, to permit persons to enter or use premises of which he is the occupier, this section shall apply as if the tenancy were a contract between the landlord and the tenant.

(5) This section, so far as it prevents the common duty of care from being restricted or excluded, applies to contracts entered into and tenancies created before the date of the commencement of this Act, as well as to those entered into or created on or after that date; but, so far as it enlarges the duty owed by an occupier beyond the common duty of care, it shall have effect only in relation to obligations which are undertaken on or after that date or which are renewed by agreement (whether expressed or implied) on or after that date.

Cf. Occupiers' Liability Act 1957, s. 3 (U.K.)

*6. Contribution between landlord and tenant as joint tortfeasors—*(1) Where a landlord is the occupier of any part of any premises that is used by a tenant, and damage is suffered by a visitor to that part of the premises as a result of the fault of the landlord and of the tenant, and the tenant would, if sued, have been liable to the visitor in respect of the damage, the landlord shall have the same right to recover contribution, under paragraph (c) of subsection (1) of section 17 of the Law Reform Act 1936, from the tenant as if the tenant were a joint occupier of that part of the premises.

(2) Where a tenant is the occupier of any part of any premises, and damage is suffered by a visitor to that part of the premises as a result of the fault of the tenant and of the landlord, and the landlord would, if sued, have been liable to the visitor in respect of the damage, the tenant shall have the same right to recover contribution, under paragraph (c) of subsection (1) of section 17 of the Law Reform Act 1936, from the landlord as if the landlord were a joint occupier of that part of the premises.

(3) For the purposes of this section—

“Landlord” includes both an immediate and a superior landlord:  
 “Tenant” includes a person occupying premises under a statutory tenancy which does not in law amount to a tenancy, or under any contract conferring a right of occupation; and also includes a subtenant.

*7. Occupier's duty to contractual visitors—*(1) Where persons enter or use, or bring or send goods to, any premises in exercise of a right conferred on them by contract with a person occupying or having control of the premises, the duty he owes them, in his capacity as occupier, in respect of dangers due to the state of the premises or to things done or omitted to be done on them shall be the common duty of care, except

so far as a contrary intention is expressed in the contract; and the provisions of subsections (2) to (8) of section 4 of this Act shall apply accordingly.

(2) In determining whether in any such case the occupier has discharged the common duty of care, so far as it is applicable, the existence and nature of the contract shall be included in the circumstances to which regard is to be had under section 4 of this Act.

(3) Subject to the provisions of section 9 of this Act, this section shall apply to fixed and movable structures as it applies to premises.

(4) This section does not apply to contracts entered into before the commencement of this Act.

Cf. Occupiers' Liability Act 1957, s. 5 (1), (2), (4) (U.K.)

**8. *Landlord's liability in virtue of obligation to repair***—(1) Where premises are occupied by any person under a tenancy which puts on the landlord an obligation to that person for the maintenance or repair of the premises, the landlord shall owe to all persons who or whose goods may from time to time be lawfully on the premises the same duty, in respect of dangers arising from any default by him in carrying out that obligation, as if he were an occupier of the premises and those persons or their goods were there by his invitation or permission but without any contract.

(2) Where premises are occupied under a subtenancy, subsection (1) of this section shall apply to any landlord of the premises (whether the immediate or a superior landlord) on whom an obligation to the occupier for the maintenance or repair of the premises is put by the subtenancy, and for that purpose any obligation to the occupier which the subtenancy puts on a mesne landlord of the premises, or is treated by virtue of this provision as putting on a mesne landlord, shall be treated as put by it also on any landlord on whom the mesne landlord's tenancy puts the like obligation towards the mesne landlord.

(3) For the purposes of this section, where premises comprised in a tenancy (whether occupied under that tenancy or under a subtenancy) are put to a use not permitted by the tenancy, and the landlord of whom they are held under the tenancy is not debarred by his acquiescence or otherwise from objecting or from enforcing his objection, then no persons or goods whose presence on the premises is due solely to that use of the premises shall be deemed to be lawfully on the premises as regards that landlord or any superior landlord of the premises, whether or not they are lawfully there as regards an inferior landlord.



(4) For the purposes of this section, a landlord shall not be deemed to have made default in carrying out any obligation to the occupier of the premises unless his default is such as to be actionable at the suit of the occupier or, in the case of a superior landlord whose actual obligation is to an inferior landlord, his default in carrying out that obligation is actionable at the suit of the inferior landlord.

(5) This section shall not put a landlord of premises under a greater duty than the occupier to persons who or whose goods are lawfully on the premises by reason only of the exercise of a right of way.

(6) Nothing in this section shall relieve a landlord of any duty which he is under apart from this section.

(7) For the purposes of this section, obligations imposed by any enactment in virtue of a tenancy shall be treated as imposed by the tenancy; and "tenancy" includes a statutory tenancy which does not in law amount to a tenancy, and includes also any contract conferring a right of occupation; and "landlord" shall be construed accordingly.

(8) This section applies to tenancies created before the commencement of this Act, as well as to those created after its commencement.

Cf. Occupiers' Liability Act 1957, s. 4 (U.K.)

**9.** *Act not to apply to certain contracts of hire or carriage, etc.*—This Act shall not apply to the obligations of any person under or by virtue of any contract for the hire of, or for the carriage for reward of persons or goods in, any vehicle, vessel, aircraft, or other means of transport, or under or by virtue of any contract of bailment.

Cf. Occupiers' Liability Act 1957, s. 5 (3) (U.K.)

**10.** *Act to bind the Crown*—This Act shall bind the Crown.

Cf. Occupiers' Liability Act 1957, s. 6 (U.K.)

This Act is administered in the Department of Justice.



## APPENDIX D

### OCCUPIERS' LIABILITY ACT

Occupiers' Liability Act as drafted by the Commissioners  
on Uniformity of Legislation in Canada

1.—(1) The provisions of this Act apply, in place of the rules of the common law, for the purpose of determining the care that a person occupying or having control of land or other premises (in this Act referred to as an “occupier of premises”) is required, by reason of such occupation or control, to show toward persons entering on the land or other premises in respect of dangers to them or to their property that are due to the state of the land or other premises, or to anything done or omitted to be done on them by himself or a third party and for which he is by law responsible.

1.—(2) Subsection (1) does not apply to alter the rules of the common law that determine the person on whom, in relation to the land or other premises, a duty to show care toward persons entering thereon is incumbent.

1.—(3) The provisions of this Act apply in like manner and to the same extent as in subsection (1) to persons entering on the following structures:—

- (a) ships and vessels;
- (b) trailers and portable structures designed or used for a residence, business, or shelter;
- (c) trains, railway cars, vehicles, and aircraft while not in operation;  
and
- (d) any structure erected on land, but not including portable structures and equipment except those included in clause (b),

and to their property thereon, and to the property of persons who have not themselves entered on the land, premises, or structure.

1.—(4) Nothing in this Act shall relieve an occupier of premises of any duty to show, in any particular case, any higher standard of care which in that case is incumbent on him by virtue of any enactment or rule of law imposing special standards of care on particular classes of persons.

2.—(1) The care that an occupier of premises is required by reason of his occupation or control of land or premises to show towards a person entering thereon in respect of dangers that are due

(a) to the state of the land or premises ; or

(b) to anything done or omitted to be done thereon by the occupier or by third parties on the land or premises

and for which the occupier is by law responsible shall, except in so far as he is entitled to and does, by express agreement, extend, restrict, modify, or exclude his obligations toward that person, be such care as in all the circumstances of the case is reasonable to see that that person will not suffer injury or damage by reason of any such danger.

2.—(2) Where an occupier of premises is bound by contract or by the terms and conditions of a tenancy, including a statutory tenancy, to admit to land or premises a person who is not entitled to the benefit of the contract as a party, or an assignee of, or other successor thereto, the occupier of premises shall show the same care as under subsection (1) in respect of dangers to that person notwithstanding any restriction or exclusion in the contract.

2.—(3) Notwithstanding subsection (1), an occupier is not responsible to a person entering on land or premises in respect of risks willingly accepted by that person.

3.—(1) Where land or premises are occupied or used by virtue of a tenancy under which the landlord is responsible for the maintenance or repair of the land or premises, it shall be the duty of the landlord to show towards any persons who or whose property may from time to time be on the land or premises the same care in respect of dangers arising from any failure on his part in carrying out his responsibility as is required by virtue of the provisions of this Act to be shown by an occupier of premises towards persons entering on them.

3.—(2) Where land or premises are occupied or used by virtue of a subtenancy, the foregoing subsection shall apply to any landlord who is responsible for the maintenance or repair of the land or premises comprised in the subtenancy.

3.—(3) Where land or premises are put to a use not permitted by a tenancy and the landlord of whom they are held under the tenancy is not debarred by acquiescence or otherwise from objecting or from enforcing his objection, subsection (1) does not apply to impose any duty on that landlord or any landlord superior to him towards a person whose presence or the presence of whose goods on the land or premises is due solely to that use of the land or premises, whether or not, in respect of an inferior landlord, the person or goods is or are lawfully there.

3.—(4) A landlord is not in default in fulfilling his duty under subsection (1) unless the default is actionable at the suit of the occupier of the premises or, where subsection (1) applies by virtue of subsection (2), at the suit of the inferior landlord of the land or premises.

3.—(5) Nothing in this section relieves a landlord of any duty which he is under apart from this section.

3.—(6) For the purposes of this section, obligations imposed by any enactment in virtue of a tenancy shall be treated as imposed by the tenancy, and “tenancy” includes a statutory tenancy and any contract conferring the right of occupation and “landlord” has a corresponding meaning.

3.—(7) This section applies to tenancies created before the commencement of this Act, as well as those created after the commencement.

4. The Tortfeasors and Contributory Negligence Act [or the Contributory Negligence Act] applies to this Act.

5.—(1) Except as otherwise provided in subsection (2), the Crown in right of the Province is bound by this Act, and the Proceedings Against the Crown Act applies.

5.—(2) Notwithstanding subsection (1), this Act does not apply to the Crown in right of the Province or in right of Canada, or to a municipality, where the Crown or the municipality is an occupier of a public highway or public road [or a road under the Forest Act and the Private Roads Act].













